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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ZAYN AL-ABIDIN MUHAMMAD HUSAYN
also known as ABU ZUBAYDAH,

Plaintiff,

v.

JAMES MITCHELL and JOHN “BRUCE”
JESSEN,

Defendants.

Case No.: 2:23-cv-00270

**DEFENDANTS’ REPLY
MEMORANDUM IN
SUPPORT OF
DEFENDANTS’ MOTION
TO DISMISS
PLAINTIFF’S
COMPLAINT
PURSUANT TO FRCP
12(b)(1) AND 12(b)(6)**

Hearing Date, February 15,
2024.

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I. INTRODUCTION

When the law is applied to the facts alleged, Plaintiff's claims fail for all the reasons detailed in Defendants' Motion to Dismiss. Seeking to avoid this outcome, Plaintiff goes to great lengths to mischaracterize both the facts and the applicable law. Plaintiff consistently misstates the law by relying on inapplicable authority—proclaiming definitive legal conclusions absent support, and distorting the governing authority cited by Defendants. He similarly misstates the facts pled—endeavoring to paint a false picture in which Plaintiff had no Al Qaeda involvement (despite his having detailed information about imminent attacks and identifying Mokhtar), and in which Defendants were rogue actors interrogating Plaintiff with little CIA involvement (despite the CIA observing and controlling the entire process from the next room, including when Defendants could stop interrogation).

Plaintiff deploys this deception because his Complaint fails. The ATS claims require Plaintiff to allege that Defendants acted under color of law, but the MCA divests the Court of jurisdiction if Defendants were agents of the U.S. Thus, Plaintiff tries to create a space between (i) ATS jurisdiction and (ii) MCA applicability, by misrepresenting ATS and agency law, as well as the relationship between Defendants and the CIA. No such space exists, and Plaintiff's claims should thus be dismissed under the MCA. Moreover, even if the MCA was found inapplicable, derivative sovereign immunity and the political question doctrine mandate the dismissal of this action nonetheless.

II. THE MCA DIVESTS THE COURT OF JURISDICTION.

Plaintiff admits if Defendants were "agents" of the Government, the MCA strips this Court of jurisdiction. Opp'n 7. Despite this concession, Plaintiff wrongly concludes that Defendants do not qualify as agents based on numerous legal/factual misstatements.

A. Plaintiff Misstates the Law of Agency.

For a principal-agency relationship to exist, an agent need *not* have the power to bind the principal in contracts. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006)

1 (“Agents who lack authority to bind their principals to contracts nevertheless often have
2 authority to negotiate or to transmit or receive information on their behalf.”). And the
3 lone case Plaintiff cites to claim Defendants could not be agents unless they could
4 “bind” the Government is off point. At issue in *Thomas v. I.N.S.*, was whether a U.S.
5 Attorney had actual authority to enter a contract that bound the Immigration and
6 Naturalization Services. 35 F.3d 1332, 1338 (9th Cir. 1994). But *Thomas* only analyzed
7 whether, as a government agent, there was actual authority to make a plea deal—*not*
8 whether an agency relationship existed. Defendants do not claim authority to offer plea
9 agreements or contract on behalf of the Government, thus rendering *Thomas* irrelevant.

10 Plaintiff also misstates the Restatement’s guidance that an agent acts on “behalf
11 of another person with *power to affect the legal rights and duties of the other person.*”
12 Opp’n 7 (emphasis in original). This does *not* mean an agent must be able to bind a
13 principal to create an agency relationship. Rather, it addresses only whether the person
14 can actually take the action at issue. RESTATEMENT § 3.05 cmt b (“An agent’s power to
15 affect the principal’s legal relations is usually limited only by the agent’s ability to take
16 action.”). For instance, representing a person as a lawyer requires the representative be
17 a lawyer. *Id.* It is then the scope of the agent’s actual (or apparent) authority that defines
18 the extent the agent can impact the legal relations of another. *Id.* (explaining one who
19 acts with apparent authority has “power to affect the legal relations of another person
20 even though actual authority” is lacking). Thus, Plaintiff’s purposeful confusion of the
21 elements of an agency relationship to suggest none exists here must be rejected. The
22 Restatement clearly explains, “[i]f the principal requests another to act on the principal’s
23 behalf, indicating that the action should be taken without further communication and
24 the other consents so to act, an agency relationship exists.” *Id.* § 1.01 cmt c.

25 Next, Plaintiff overstates the importance of the term “independent contractor”
26 used in Defendants’ contracts. The Restatement and interpretive caselaw is unequivocal
27 that a party labeled “independent contractor” *can still be an agent*. Mot. 9. The existence
28 of an agency relationship is determined through an “assessment of the facts of the

relationship and not based on how the parties define their relationship.” RESTATEMENT § 1.02. Thus, Plaintiff’s supposition notwithstanding, *see* Opp’n 7, the MCA need not use the term “contractor” to apply to Defendants—agents as the Complaint establishes.¹

B. Plaintiff Misstates the Facts He has Pled.

Contrary to Plaintiff’s assertion, his Complaint plainly alleges Defendants were Government agents. Plaintiff claims after the CIA took over his interrogation, Defendants interrogated him at a top-secret CIA black site, applying top-secret interrogation techniques which were approved by the DOJ’s highest levels, while the CIA observed and provided direction. Compl. ¶¶57-58, 76-80, 82, 85. And Plaintiff admits this occurred when the CIA was “under immense pressure to produce actionable intelligence” after the September 11 intelligence failures and while the Vice President urging the CIA to “use any means at our disposal.” *Id.* ¶¶4, 30. Given these allegations, how could Defendants not have been agents of the U.S.? Indeed, absent agency how would Defendants have gained access to a top-secret CIA black site, the location of which the Supreme Court ruled Defendants cannot disclose because it would harm foreign relations? To distract from the facts pled, Plaintiff claims Defendants must be “authorized representatives of the U.S.,” or have “the power to bind the U.S.”—but cites *no* supportive authority (or even define his chosen phrases). Opp’n 11. In any event, as explained above, no such finding is necessary to establish agency.

The Complaint also alleges far more than some “very limited and irrelevant [CIA] direction over” Defendants. Opp’n 11; *see* Compl. ¶¶62, 79, 80, 82, 85. Deploying revisionist history, Plaintiff now claims Defendants were rogue actors. This is displayed

¹ Plaintiff faults Defendants for not placing their contracts before the Court. Plaintiff misunderstands Defendants’ position. *The Complaint alone* establishes Defendant’s agency relationship. Thus, no further evidence—including Defendants’ contracts—is needed to show the MCA’s applicability. Should the Court disagree, Defendants request limited jurisdictional discovery so this threshold issue can be quickly resolved.

1 by his attempt to rebuff Justice Gorsuch’s dissent as only “ascrib[ing] some level of
2 responsibility to the CIA,” Opp’n 21, even though Justice Gorsuch detailed how
3 Defendants acted on the CIA’s behalf, and at its direction, when Defendants sought to
4 end Plaintiff’s interrogation—but the CIA overrode them. *1782 Litigation*, 595 U.S.
5 195, 238 (2022) (Gorsuch, J., dissenting). The Complaint also alleges Defendants were
6 acting with at least “apparent (though not bona fide) authority,” Compl. ¶117, which
7 cannot exist but-for an agency relationship. And this is consistent with Plaintiff’s
8 admission that Defendants’ actions were ascribed to the Government. Opp’n 39
9 (quoting Press Conference by President Obama in which he stated “[W]e tortured some
10 folks.”); *1782 Litigation*, 595 U.S. 238 (Gorsuch, J., dissenting) (noting Plaintiff sought
11 information about his interrogation “at the hands of the CIA”). The Complaint’s
12 allegations provide the very evidence Plaintiff claims is absent. *See* Opp’n 8-9.

13 Regardless of any superficial label, Defendants were acting as agents of the CIA
14 when they interrogated Plaintiff. Defendants cited three cases identifying that finding
15 an agency relationship here aligns with rulings across the Ninth Circuit—all of which
16 post-date *Salim*. Mot. 10. Plaintiff attempts to distinguish this authority as involving
17 non-governmental independent contractors, even though Plaintiff admits the common-
18 law applied in those cases controls the agency analysis here. Opp’n 7. Plaintiff also
19 claims the authority is distinguishable because it addresses vicarious liability and
20 apparent authority, “not actual agency.” Opp’n 11-12. This is illogical and wrong.
21 Before apparent authority can be analyzed, an agency relationship must be found. This
22 is why the cited cases address, in detail, how agency existed despite the parties being
23 labeled independent contractors, then proceeded to address the grant of authority.
24 *Brown v. DirecTV, LLC*, 562 F. Supp. 3d 590, 609-10 (C.D. Cal. 2021); *Williams v.*
25 *PillPack LLC*, 644 F. Supp. 3d 845, 852-54 (W.D. Wash. 2022); *McAdory v. M.N.S. &*
26 *Assocs., LLC*, No. 3:17-CV-00777-HZ, 2021 WL 2321634, at *8-9 (D. Or. June 7,
27 2021). Notably, in assessing whether an agency relationship existed, *none* of the cases
28 use the term “bind,” let alone analyze Plaintiff’s other manufactured agency

requirements. In sum, Plaintiff fails to distinguish this authority and agency should be found to exist here, just as it was found to exist in those cases. The MCA divests the Court of jurisdiction.²

III. DEFENDANTS ARE ENTITLED TO IMMUNITY.

The Opposition grossly mischaracterizes Defendants' immunity arguments and fails to rebut the applicability of derivative sovereign immunity to this matter.

A. Defendants are Entitled to *Yearsley* Immunity Because the Government's Authority to Interrogate "Enemy Combatants" was Validly Conferred to Defendants and Defendants Did Not Exceed the CIA's Instructions Regarding Plaintiff's Interrogation.

Plaintiff acknowledges, Opp'n 14, the first test for *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), immunity is whether the "authority" delegated to the contractor was "validly conferred,"—*i.e.*, the government "acted within its constitutional power." See *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 167 (2016); see also *Cunningham v. Gen. Dynamics Info. Tech.*, 888 F.3d 640, 643 (4th Cir. 2018). But Plaintiff cannot show any lack of validly delegated authority from the Government to Defendants here.

Plaintiff cannot impugn Congress's authority to delegate national security matters to the executive branch. Nor can he challenge the executive branch's prerogative to then assign contractors to complete tasks flowing therefrom. Mot. 25. So he instead criticizes the OLC's supposed "circular logic" in approving the use of the

² Finally, it is worth noting the MCA's legislative history demonstrates it was intended to be "a protection bill for the interrogators." 152 Cong. Rec. H7, 947-48 (Sept. 29, 2006) (statement of Rep. Sensenbrenner). Yet, Plaintiff argues the MCA cannot apply because Defendants' contracts label them independent contractors. This argument effectively reads the term "agent" out of the MCA's Section 2241(e)(2). Simply put, to whom would that term apply if not Defendants, the individuals the CIA tasked with interrogating Plaintiff? It is axiomatic that statutes, including the MCA, should not be construed to render words superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

1 interrogation techniques on suspected terrorists and cites a former OLC lawyer’s
 2 testimony *from eight years later* to backstop his position. Opp’n 15. This, however,
 3 does not alter that, *at the pertinent time (2001-03)*, there was “considerable debate” over
 4 whether *applying these very techniques* constituted “torture.” Mot. 34 (citing *Brosseau*
 5 *v. Haugen*, 543 U.S. 194, 198 (2004) (immunity doctrines “judged against the backdrop
 6 of the law at the time of the conduct”). And because Defendants’ conduct was *not*
 7 decidedly “torture” in mid-2002, it cannot be said that the government did not “act[]
 8 within its constitutional power” when tasking Defendants with interrogating suspected
 9 terrorists using these techniques. *Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012)
 10 (“[A]lthough we hold that the unconstitutionality of torturing an American citizen was
 11 beyond debate *in 2001-03*, it was not clearly established at that time that the treatment
 12 *Padilla alleges he was subjected to amounted to torture.*”) (emphasis added).³ This is
 13 especially true for “enemy combatants”—like Plaintiff. *Id.* at 761 (“Even [in 2004], it
 14 remain[ed] murky whether an enemy combatant detainee may be subjected to ...
 15 methods of interrogation that would be unconstitutional if applied in the ordinary prison
 16 and criminal settings.”) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35 (2004)).

17 Plaintiff also erroneously conflates the distinct concepts of a contractor’s
 18 “authority to act” under government instruction with an act’s “legality.” Opp’n 14; *see*
 19 Mot. 26 & n.5 (citing *Cunningham*, 888 F.3d at 648 (“The question is not whether [the
 20 conduct] violated the law, but rather whether Congress had the authority to assign [the
 21 contractor] to complete that task.”)). Appellate courts have rejected the claim that “the
 22 government cannot ‘validly confer’ the authority to engage in conduct that violates the
 23 law”—calling it a “misinterpretation” of *Yearsley*, and an “overinclusive interpretation
 24 of what constitutes a ‘valid conferral’ of authority.” *Cunningham*, 888 F.3d 648-49
 25 (citing *Yearsley*, 309 U.S. at 20; *In re KBR Inc., Burn Pit Litigation*, 744 F.3d 326, 342,

27 ³ Plaintiff does not explain why Defendants could be liable for the same treatment for
 28 which Yoo was found to be immune. Mot. 19-20.

1 344 n.7 (4th Cir. 2014)). And if Plaintiff believes the alleged “acts of torture and abuse
 2 ... would be illegal for government employees,” Opp’n 15, why has he not sued these
 3 employees?

4 As to the second *Yearsley* test, Plaintiff does not plausibly allege Defendants took
 5 any action that “exceeded” the CIA’s instructions.⁴ Mot. 27-28. At best, Plaintiff merely
 6 asserts Defendants “misled” officials about the proposed “tactics,” Opp’n 16, and that
 7 his treatment “crossed legal limits.” *Id.* Noticeably absent, however, is an allegation
 8 *Defendants did anything other than what the CIA instructed.* This is fatal. *Campbell-*
 9 *Ewald*, 577 U.S. at 166 (contractor loses “derivative immunity” only when it “violates
 10 both federal law and the Government’s explicit instructions”) (emphasis added); *Ali v.*
 11 *Rumsfeld*, 649 F.3d 762, 770, 774-78 (D.C. Cir. 2011) (affirming dismissal of ATS
 12 claim for “arbitrary detention, torture, and cruel, inhuman or degrading treatment”
 13 where government officials and employees were “acting within the scope of their
 14 employment”). Nothing in the Complaint (or elsewhere) supports Plaintiff’s bare
 15 assertion that Defendants—contractors working alongside the CIA—somehow
 16 “retain[ed] full operational control over each day’s interrogation.” Opp’n 16. In fact,
 17 Plaintiff’s allegations undercut any such notion. *See* Compl. ¶85 (Defendants were
 18 required to send “CIA Headquarters a . . . summary of the day’s interrogation, and
 19 maintained data records concerning the techniques used”); *id.* ¶¶58, 95, 97 (CIA
 20 unilaterally decided which black site(s) to send Plaintiff, including sites where
 21 Defendants were not located).

22 Finally, Plaintiff’s reliance on *Childs v. San Diego Family Hous. LLC*, 22 F.4th
 23 1092 (9th Cir. 2022), as “confirm[ing]” the supposed “no discretion” limiter for
 24

25 ⁴ The Ninth Circuit has recognized that the proper inquiry under *Yearsley* is whether a
 26 contractor performed per its contractual terms. Mot. 24. Plaintiff’s reliance on *Little v.*
 27 *Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804), Opp’n 15—decided 136 years *before*
 28 *Yearsley*, and that did *not* involve a private contractor—is thus misplaced.

1 *Yearsley* immunity is unfounded. Opp’n at 16. For one, *Childs* only addressed whether
 2 the court had appellate jurisdiction over the denial of a derivative sovereign immunity
 3 defense. 22 F.4th at 1098 (holding it did not). Anything else is *dicta*. Regardless, *Childs*
 4 noted the same distinction as Defendants, Mot. 28-30, between the “government
 5 contractor defense” under *Boyle* (which considers discretion) and “derivative sovereign
 6 immunity” under *Yearsley* (which, when properly interpreted, does not).⁵ *Childs* further
 7 opined how the “public interest” underlying *Yearsley* is to extend sovereign immunity
 8 to agents “carrying out the . . . government’s directions,” as is the case here. *Id.* at 1097.

9 **B. Plaintiff Cannot Defeat Defendants’ Right to *Filarsky* Immunity.**

10 Immunity under *Filarsky v. Delia*, protects government contractors—like
 11 Defendants—from “facing full liability for actions taken in conjunction with
 12 government employees who enjoy immunity for the same activity.” 566 U.S. 377, 391
 13 (2012). It is undisputed that Defendants and particular CIA employees all engaged in
 14 the “same activity” with respect to Plaintiff’s treatment and interrogation. Mot. 30-31;
 15 *Ali v. Rumsfeld*, 649 F.3d at 774-78. Plaintiff does not argue to the contrary.

16 Instead, Plaintiff argues two of *Filarsky*’s four elements are absent. Opp’n 16-17.
 17 Specifically, Plaintiff claims *Filarsky* immunity is only available to contractors
 18 “performing governmental functions that traditionally enjoyed qualified immunity, if
 19 [they] did not violate clearly established rights in order to avoid unwarranted timidity.”
 20 *Id.* 17. Defendants easily satisfy both considerations, entitling them to immunity.

21 First, Defendants have explained how “general principles of immunity at
 22 common law” in 1871 permitted private psychologists to assert qualified immunity
 23 where, as here, they “work[ed] in a public institution . . . alongside government
 24 employees [and] their public counterparts would be entitled to assert qualified
 25 immunity.” Mot. 32-33 (citing *Perniciaro v. Lea*, 901 F.3d 241, 252 (5th Cir. 2018)).

27 ⁵ *Childs*, 22 F.4th at 1097 n.3 (observing how both doctrines “derived from *Yearsley*”
 28 before the Supreme Court “expanded” the government contractor defense in *Boyle*).

1 Plaintiff's retort is to claim *Perniciaro* represents a "split" from cases like *Jensen v.*
 2 *Lane County*, 222 F.3d 570 (9th Cir. 2000). Opp'n 17. Not so. *Perniciaro* correctly
 3 criticized *Jensen*: (i) for its overly narrow reading of the need for historical immunity
 4 at common law; and (ii) because *Jensen* was decided 12 years before *Filarsky*. Mot. 33
 5 n.8. If *Jensen* had *Filarsky*'s guidance, the outcome would have been different. Indeed,
 6 *Jensen* relied heavily on *Richardson v. McKnight*, 521 U.S. 399 (1997), which *Filarsky*
 7 clarified "was not meant to foreclose all claims of immunity by private individuals,"
 8 and that the "particular circumstances of [*Richardson*]"—"a private firm, systematically
 9 organized to assume a major lengthy administrative task (managing an institution) with
 10 limited direct supervision by the government, undertak[ing] that task for profit and
 11 potentially in competition with other firms"—combined sufficiently to mitigate the
 12 concerns underlying recognition of governmental immunity[.]" 566 U.S. at 393. As in
 13 *Filarsky*, and unlike *Richardson*, "[n]othing of the sort is involved here[.]" *Id.* Thus,
 14 *Jensen*—which described *Richardson*'s rationale as "instructive," and opined "[*Jensen*]
 15 is similar to *Richardson* in many respects"—is readily distinguishable. 222 F.3d at 578.

16 Regardless, courts in the Ninth Circuit have also distinguished *Jensen* where, as
 17 here, the "privatization and market forces arguments that the Ninth Circuit found
 18 persuasive in *Jensen* and the Supreme Court relied upon in *Richardson* play little to no
 19 role." *Braswell v. Shoreline Fire Dep't*, No. C08-924-RSM, 2012 WL 1857858, at *6
 20 (W.D. Wash. May 22, 2012). Here, Plaintiff concedes the CIA recruited and retained
 21 Defendants—who were the "only candidate[s] considered" that the CIA "thought to be
 22 knowledgeable[.]" Compl. ¶¶ 49-50; *cf. Jensen*, 222 F.3d at 578 (observing "concerns
 23 about [contractor] timidity are moderated by the likelihood [defendant's] failure to
 24 adequately complete the ... duties for which it has contracted will lead to its
 25 replacement by competitors.").⁶ Indeed, the case for immunity is actually heightened

27 ⁶ That Defendants were compensated for their specialized services—for which the CIA
 28 sought them out, Compl. ¶¶ 49-53—does not change the immunity analysis. Mot. 33

1 where, as here, the “specialized” work concerns perilous matters of “national security.”
 2 *Mitchell v. Forsyth*, 472 U.S. 511, 541-42 (1985) (Stevens, J., concurring) (“Persons of
 3 wisdom and honor will hesitate to answer the President’s call to serve ... if they fear
 4 that vexatious and politically motivated litigation ... will squander their time and
 5 reputation[.]”); *Turkmen v. Hasty*, 789 F.3d 218, 281 (2d Cir. 2015) (Raggi, J.,
 6 dissenting) (“It is difficult to imagine a public good more demanding of decisiveness or
 7 more tolerant of reasonable, even if mistaken, judgments than the protection of this
 8 nation and its people from further terrorist attacks in the immediate aftermath of the
 9 horrific events of 9/11”), *reversed in part and vacated and remanded in part sub nom.*
 10 *Ziglar v. Abbasi*, 582 U.S. 120, 152-56 (2017) (officials and wardens held immune to
 11 civil conspiracy claims by alien detainees challenging confinement conditions imposed
 12 after 9/11). Denying immunity here fosters the “timidity” *Filarsky* strived to prevent.

13 Second, as noted above, Defendants did not “violate well-established
 14 prohibitions” against “torture” in 2001-03 by applying the DOJ-approved interrogation
 15 techniques to Plaintiff—an “enemy combatant.” *See* Sec. III.A. Finally, Plaintiff has no
 16 response to Defendants’ cited authority holding that contractors are entitled to immunity
 17 where, as here, they “direct[ly]” contracted with the government and/or acted under its
 18 “close official supervision.” Mot. 34. This too is a sufficient basis to grant immunity.

19 **IV. COLLATERAL ESTOPPEL CANNOT BE APPLIED HERE.**

20 Plaintiff, attempting to patch his arguments’ fatal flaws, claims Defendants are
 21 estopped from arguing the Court lacks jurisdiction under the MCA or that Defendants
 22 are entitled to immunity, because the *Salim* court issued interim rulings when faced with
 23 *Salim*’s facts. Opp’n 18-22. Not so. Offensive nonmutual issue preclusion is
 24 discretionary, and “appropriate only if (1) there was a full and fair opportunity to litigate
 25 the *identical* issue in the prior action; (2) the issue was actually litigated in the prior
 26

27 (citing *Ford v. Anderson Cty.*, No. 6:19-CV-384-JDK, 2022 WL 1424973, at *17 (E.D.
 28 Tex. May 5, 2022) (private physician paid \$1,500/month held to be immune)).

1 action; (3) the issue was decided in a final judgment; and (4) the party against whom
 2 issue preclusion is asserted was a party or in privity with a party to the prior action.”
 3 *Syverson v. Int’l Bus. Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007) (internal
 4 citations omitted) (emphasis added). Plaintiff cannot establish these elements.

5 **A. Defendants Are Not Precluded From Arguing the MCA Applies.**

6 *Salim* declined to apply the MCA because those detainee-plaintiffs were not
 7 properly determined to be “enemy combatants,” and because Defendants had not
 8 established they were agents “based on the record submitted.” *Salim II*, 2017 WL
 9 390270, at *4-7. That ruling has no preclusive effect. First, Defendants did *not* have a
 10 “full and fair opportunity” to litigate the “identical issue.” Specifically, while Plaintiff
 11 claims *Salim* engaged in a substantive analysis concerning Defendants’ agent status, *see*
 12 Opp’n 20, *Salim* denied Defendants’ request for an evidentiary hearing to address
 13 agency. 2017 WL 390270, at *7. This renders the *Salim II* ruling inappropriate for
 14 offensive nonmutual collateral estoppel: “If procedural opportunities unavailable in the
 15 first action could readily cause a different result in the second action, then the results of
 16 the first action generally should not be given preclusive effect.” *Maciel v. Comm’r*, 489
 17 F.3d 1018, 1023 (9th Cir. 2007) (internal quotations omitted); *cf. Ludwig v. Arizona by*
 18 *& through Brnovich*, 790 Fed. App’x. 849, 852 (9th Cir. 2019) (holding party had “full
 19 and fair opportunity” to litigate issue following a two-day evidentiary hearing).

20 The *Salim* court presumably refused to hold an evidentiary hearing because its
 21 ruling on agency was not outcome determinative: even if Defendants were found to be
 22 agents, the MCA was inapplicable because the *Salim* plaintiffs were not enemy
 23 combatants. Conversely, here, Plaintiff is an “enemy combatant”—rendering the
 24 present issue “not identical.” *Syverson*, 472 F.3d at 1081 (issues not sufficiently
 25 identical where prior ruling did not end with the issue at hand, but also included facts
 26 specific to prior case). Further, for application of issue preclusion, “the issue in the prior
 27 litigation must have been a critical and necessary part of the judgment in the earlier
 28

1 action.” *Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir. 2003). Because agency
2 was unnecessary to the *Salim II* ruling, it cannot be used offensively.

3 Additionally, the *Salim II* ruling was not a “final judgment” on this issue. The
4 *Salim* court clarified its agency ruling was limited by “the record submitted,” and did
5 not foreclose the possibility that a more fulsome record would establish agency (despite
6 stymying Defendants’ ability to develop such a record). *Salim II*, 2017 WL 390270, at
7 *7. Such a tentative ruling is not “sufficiently firm” to be accorded conclusive effect.
8 *See Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983). Thus,
9 Defendants are not estopped from invoking the MCA. And even if all four elements had
10 been met, courts should “take potential shortcomings or indices of unfairness into
11 account when considering whether to apply offensive nonmutual issue preclusion.”
12 *Syverson*, 472 F.3d at 1078 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331
13 (1979)). It would be particularly unfair to apply collateral estoppel when Defendants
14 were previously denied the chance to develop such evidence.

15 Plaintiff, hoping to rehabilitate his infirm collateral estoppel argument, curiously
16 argues the *1782 Litigation* supports precluding Defendants from invoking the MCA
17 because Defendants appealed other issues in that litigation, but not the finding the MCA
18 was inapplicable. Opp’n 21. This argument is misdirected. *Defendants appealed no*
19 *issues* in the *1782 Litigation* and, critically, *were not even active participants*. 595 U.S.
20 at 197. The U.S. intervened early in *1782 Litigation* via a motion to quash—asserting
21 the MCA divested the court of jurisdiction, and that the states secret privilege applied
22 because if Defendants were to divulge the location of the CIA black sites, it would harm
23 national security interests. *Id.* at 203. The district court granted the U.S.’ motion—so
24 there was no need to appeal—as the U.S. obtained the relief sought. *Id.* It was Plaintiff
25 who appealed to the Ninth Circuit, which reversed the application of the state secret
26 privilege. *Id.* In response, the U.S. appealed to the Supreme Court, where the privilege
27 was found to apply, and the subpoena remained quashed. *Id.* at 207.

1 Ironically, Plaintiff now faults Defendants for not appealing the district court’s
 2 ruling that *granted* the U.S.’ motion because that ruling also made a superficial finding
 3 that the MCA was inapplicable because no additional evidence had been presented on
 4 the issue of agency. Plaintiff, petitioner in the *1782 Litigation*, knows Defendants
 5 played no part in those appeals, and, therefore, do not afford him the desired preclusive
 6 effect. The Court should address Defendants’ argument that the MCA applies on the
 7 Complaint before it and allow jurisdictional discovery to give Defendants the
 8 opportunity to fully and fairly litigate the issue in the event the MCA’s dispositive
 9 impact is not clear on the Complaint’s face—an opportunity they were denied in *Salim*.

10 **B. Defendants Are Not Precluded From Arguing Immunity Applies.**

11 Plaintiff similarly claims Defendants are precluded from advancing their
 12 entitlement to derivative sovereign immunity because *Salim* already ruled on this issue.
 13 Opp’n 18-20. Plaintiff is again incorrect. The rulings addressing Defendants’ claimed
 14 immunity were *not* final judgments. “[A] district court order denying a claim of
 15 derivative sovereign immunity is not immediately appealable under the collateral order
 16 doctrine.” *Childs*, 22 F.4th at 1094. Thus, had Defendants sought to appeal the *Salim*
 17 rulings, their appeal would have been dismissed for lack of jurisdiction. *Id.* Plaintiff
 18 instead tries to delude the Court, broadly claiming “*qualified* immunity” rulings are
 19 immediately appealable. Opp’n 20 (emphasis added). But derivative sovereign
 20 immunity under *Yearsley* (and even *Filarsky*) is a distinct legal doctrine from traditional
 21 “qualified immunity” under 42 U.S.C. § 1983. That *Salim*’s rulings were not appealable
 22 weighs heavily against their finality for preclusion purposes. *See Luben*, 707 F.2d at
 23 1040; *Householder Grp., LLLP v. Van Mason*, No. CV 09-2370-PHX-MHM, 2010 WL
 24 5093117, at *3 n.2 (D. Ariz. Dec. 8, 2010) (observing appealability is of “paramount
 25 importance” for estoppel).

26 Collateral estoppel is also inapplicable because Defendants did *not* have a “full
 27 and fair opportunity” to litigate an “identical issue” in *Salim*. While *Salim* mentions
 28 Plaintiff’s early treatment as a precursor to the three specific detainee-plaintiffs in that

1 case, the court did *not* decide Defendants’ entitlement to immunity *as to Plaintiff*. At
 2 both the motion to dismiss and summary judgment phases, the court observed an
 3 “inquiry [was] required into whether the contractor ‘exceeded his authority,’ or whether
 4 the government authority ‘was not validly conferred’ in the context of the *Salim*
 5 plaintiffs. *Salim I*, 183 F. Supp. 3d at 1130; *Salim III*, 268 F. Supp. 3d at 1148. And at
 6 summary judgment, the focus was whether “Defendants, being on site, exercised
 7 significant control *during individual interrogations*.” *Salim III*, 268 F. Supp. 3d at 1150
 8 (emphasis added). Thus, *Salim* recognized that the context of the *individual* detainee’s
 9 treatment properly determines whether a contractor “exceeded his authority.” And no
 10 such ruling occurred as to Plaintiff. To that end, courts have also made independent
 11 immunity determinations with respect to *different contractors* working on the same
 12 project, and under the same delegated authority. *See In re Oil Spill by the Oil Rig*
 13 “*Deepwater Horizon* No. MDL 2179, 2016 WL 614690, at *10 (E.D. La. Feb. 16, 2016)
 14 (private contractors who operated under the valid conferral of government authority
 15 from the Clean Water Act in connection with the Deepwater Horizon disaster, and who
 16 followed government instructions, held immune); *In re Oil Spill by the Oil Rig*
 17 “*Deepwater Horizon*,” 2016 U.S. Dist. LEXIS 101175, at *36 (E.D. La. Aug. 2, 2016)
 18 (additional contractors immune). Because *Salim* did not specifically assess Plaintiff’s
 19 interrogation, it is improper to apply issue preclusion with respect to immunity here.⁷

20 **V. THE POLITICAL QUESTION DOCTRINE APPLIES TO CIA**
 21 **“CONTRACTORS.”**

22 Contrary to Plaintiff’s suggestion, Defendants do *not* “tacitly concede” their
 23 political question doctrine argument falters under the *Baker* standard. Opp’n 37-38.
 24 Moreover, Plaintiff misunderstands that the *Taylor* test does not supplant the *Baker*
 25 factors; rather, it *focuses and distills* the *Baker* factors to apply to the modern world in
 26 which contractors are increasingly used to support and accomplish executive branch

27 ⁷ Should this case proceed to discovery, discretion-based discovery would be different
 28 than in *Salim*, further establishing this is *not* an identical issue previously considered.

1 functions—the exact issue *Taylor* presents. Defendants suggest usage of the *Taylor* test
2 because it is most on point. But the outcome is the same under either test.

3 That Plaintiff insinuates the CIA is somehow outside the government because it
4 is a “civilian intelligence agency” defies logic and a basic understanding of our nation’s
5 structure. Opp’n 39. And Plaintiff cites *nothing* to support his bare supposition the CIA
6 (or a CIA contractor) should be treated differently than the military (or a military
7 contractor). This manufactured distinction is especially baseless considering the CIA
8 was making decisions similar to its military counterparts in response to the 9/11 attacks.
9 Indeed, Plaintiff acknowledges the CIA was taking actions in defense of the country—
10 as instructed by the Vice President. Compl. ¶30.

11 Further, the CIA and its contractors do not fall outside of the scope of the political
12 question doctrine simply because the CIA is not part of the “military,” as defined by
13 Plaintiff again without support. Opp’n 39-40. In fact, the political question doctrine has
14 been applied to CIA decisions innumerable times. *See e.g., Hmong 2 v. United States*,
15 799 Fed. App’x. 508, 509 (9th Cir. 2020) (suit against CIA and U.S. nonjusticiable
16 because decision to grant aid to foreign military group was a political decision entangled
17 with conduct of foreign relations); *Harbury v. Hayden*, 522 F.3d 413, 420 (D.C. Cir.
18 2008) (common law tort claims arising from CIA’s alleged torture and killing of the
19 plaintiff’s husband in Guatemala in the early 1990’s presented a political question);
20 *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 737 (S.D.N.Y. 1986) (suit
21 where plaintiff claimed CIA negligently placed land mines in Nicaraguan harbor that
22 damaged plaintiff’s ships found nonjusticiable). Plaintiff’s claimed distinction is
23 baseless.

24 Plaintiff’s analysis of the *Taylor* test is similarly flawed. Plaintiff relies
25 exclusively on conclusory statements that “there was no military control,” and
26 “Defendants exceed their authority,” to support his argument there could be no
27 “intertwinement between national defense decisions and Defendants conduct.” Opp’n
28 39-40. But, the record does not support these statements and does not rebut Defendants’

1 detailed analysis. Mot. 14-18. Critically, Plaintiff alleges a “CIA takeover” of Plaintiff’s
2 interrogation, with Defendants’ use of enhanced interrogation techniques undertaken at
3 the request of, and pursuant to, the direct supervision of the CIA and only after DOJ
4 approval. Compl. ¶¶16, 32, 33, 41, 49, 57, 70, 73, 76, 77, 85, 140. The application of
5 those techniques was inextricably intertwined with the CIA’s actions and judgments
6 in response to the Al Qaeda threat. *Id.* Plaintiff’s newly-manufactured conclusory
7 statements cast no doubt on either prong of *Taylor*’s test. *In re: KBR, Inc.*, 893 F. 3d
8 241, 259-60 (4th Cir. 2018); *Taylor*, 658 F.3d at 411.

9 Next, Plaintiff is incorrect that *Salim* and *Al-Shimari* control the outcome. Opp’n
10 37, 40. As Defendants’ detailed, the *Taylor* test has garnered additional support since
11 *Salim* was decided, and the cases relied upon in *Salim* simply do not support that
12 Plaintiff’s interrogation by Defendants is justiciable. Mot. 23. And the stark
13 dissimilarities between the conduct at issue in *Al-Shimari* and the instant conduct
14 renders inapt any unlawfulness conclusion sought to be derived therefrom. Mot. 21-22.

15 Finally, even if the Court is inclined to utilize the *Baker* factors in their raw form
16 to analyze the presence of a political question, such a question clearly exists. A textually
17 demonstrable commitment to the executive and legislative Branches over decisions
18 involving war and foreign policy is undeniable. *See* U.S. CONST. art II, § 2, cl. 1; art. I,
19 § 1, cls. 12-14; art. II, § 2. And because the Ninth Circuit has determined there was no
20 clearly recognized definition of “torture” during the period in which Defendants’
21 alleged conduct took place, neither can there be judicially manageable standards. *Yoo*,
22 678 F.3d at 764. It is also undebatable that the interrogation techniques’ application was
23 inherently entangled with political decisions because those judgments were themselves
24 inextricably intertwined with the CIA’s actions and determinations in response to the
25 Al Qaeda threat. Compl. ¶¶16, 32, 33, 41, 49, 57, 70, 73, 76, 77, 85, 140. Lastly, Plaintiff
26 tries to sidestep the political question doctrine’s application because “every branch has
27 [after-the-fact] described Defendant’s acts as torture.” Opp’n 38-39. In light of the
28 uncertainty of the legality of the conduct in 2002, as discussed *supra*, the Court should

not be swayed by these post-hoc politically-motivated pronouncements, but perform the “discriminating case-by-case analysis” into whether a political question is so inextricably tied to the case. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 551 (9th Cir. 2014) (citations omitted). In sum, Plaintiff does not and cannot meaningfully contest the application of the political question doctrine under either the *Taylor* test or the *Baker* factors.

VI. PLAINTIFF HAS NOT ALLEGED COGNIZABLE ATS CLAIMS

A. State Acquiescence Is Insufficient Under the ATS.

Plaintiff admits “private conduct without government involvement” cannot support Counts I, II, and IV, Opp’n 23, and concedes that if Defendants are U.S. agents, the Court lacks jurisdiction. *Id.* at 7. Thus, Defendants do not divine a “catch-22”—the law creates it. Plaintiff, desperate to escape this dilemma, misrepresents the law. Plaintiff curiously claims Defendants somehow devised the (well-established) state action requirement applicable to ATS torture claims. *Id.* at 23-24; *but see Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009) (failure to allege state action is fatal to an ATS claim); Mot. 35. Plaintiff also errantly claims he must show only that the government “acquiesced” in Defendants’ conduct—citing no authority addressing an ATS claim. Rather, Plaintiff relies exclusively on the CAT to support this assertion. Opp’n 23-26. But the CAT merely defines “torture;” it does not impact the ATS’ state action requirement—as evidenced by the fact that none of Plaintiff’s cited cases concern the ATS or state action requirement. *See Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004) (discussing CAT’s torture definition for an asylum claim); *Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013) (assessing CAT’s Art. 3 in asylum context).

Worse, in an attempt to distinguish the on-point ATS cases Defendants identify, Plaintiff warps the law. For example, he argues *Kadic*’s § 1983 color of law language only applies in the Torture Victim Protection Act (“TVPA”) context, when that court explicitly states, “the color of law jurisprudence ... is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien

1 Tort Act.” *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). Indeed, Plaintiff
 2 misconstrues the court’s distinction between the ATS and the TVPA. While the ATS is
 3 broader, this is only because it dispenses with the state action requirement for certain of
 4 its claims (none applicable here), while TVPA liability always requires such showing.
 5 *Id.* at 241. In fact, *Kadic* highlights the distinction between the CAT and the ATS’ state
 6 action requirement in that it cites the CAT solely to “defin[e] torture.” *Id.* at 244.
 7 Torture’s definition is not disputed in this action. Plaintiff also attempts to distinguish
 8 *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). But
 9 *Aldana* repudiates Plaintiff’s acquiescence standard. *Id.* at 1248. (“Guatemala’s
 10 registration and toleration of private security forces does not transform those forces’
 11 acts into state acts.”). *Aldana* then adds, “[t]his lack of state action is *particularly*
 12 *definite* where, as here, Plaintiffs do not allege sufficient facts to warrant the inference
 13 that the National Police knew of and purposefully turned a blind eye to the events.” *Id.*
 14 (emphasis added). Plaintiff interprets this as saying that had the Police known, the state
 15 action requirement would have been met. Wrong. This statement is merely explaining
 16 that the state action requirement was completely out of reach, i.e. even had the police
 17 known, the requirement would not have been met—the police’s lack of knowledge
 18 simply made that determination more definite.

19 Contrary to Plaintiff’s representations, a “threshold question in any AT[S] case
 20 against a private party ... is whether the alleged tort requires the private party to engage
 21 in state action for AT[S] liability to attach, and if so, whether the private party in fact
 22 engaged in state action.” *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002). No
 23 ATS case addressing torture, non-consensual medical experimentation, or arbitrary
 24 detention has held that acquiescence alone satisfies this threshold issue. And while
 25 Plaintiff attempts to deny it absent authority, “courts look to the standards developed
 26 under 42 U.S.C. § 1983 to determine whether the [ATS] claim [against a private actor]
 27 will stand.” *Nat’l Coal. Gov’t of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 345
 28 (C.D. Cal. 1997). Specifically, courts look to whether “a private individual acts under

1 color of law within the meaning of section 1983” by acting together with state officials
 2 or with significant state aid. *Id.* The Complaint concedes this is the relevant standard; it
 3 alleges Defendants “acted under color of law ... in that they acted with apparent (though
 4 not bona fide) authority.” Compl. ¶117. Plaintiff attempts to lessen the standard required
 5 for state action only because he now recognizes that in alleging Defendants acted under
 6 color of law, he has pled an agency relationship resulting in MCA applicability.

7 **B. Finding Plaintiff Alleged Non-Consensual Medical Experimentation**
 8 **Would Greatly Expand Pfizer**

9 In interpreting the ATS’ bounds, the Supreme Court has stressed restraint and
 10 caution. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); Mot. 37. Plaintiff asks this
 11 Court to extend the holding in *Abdullahi v. Pfizer, Inc.*, the sole case allowing non-
 12 consensual medical experimentation to support an ATS claim, beyond large-scale
 13 testing of drugs without informed consent, thereby stripping this already tenuous claim
 14 of the only shred of specificity it maintains. 562 F.3d 163,185 (2d Cir. 2009) (“[T]he
 15 prohibition in question applies to the testing of drugs without the consent of human
 16 subjects on the scale Pfizer allegedly conducted”). Plaintiff asserts confining the scope
 17 of *Pfizer* to the very parameters the Second Circuit defined would be a “novel
 18 limitation.” Opp’n 33. But, specificity is a critical element in establishing new ATS
 19 claims, and, as such, expanding *Pfizer* is the novel approach. *Sosa*, 542 U.S. 692 at 738.
 20 Plaintiff’s invitation should be declined.

21 **C. Defendants Are Not Liable For Plaintiff’s Entire Detention**

22 The Complaint advances a claim for arbitrary detention, seeking to hold
 23 Defendants liable for Plaintiff’s decades-long detention at U.S. black sites and military
 24 bases, which plainly contradicts Plaintiff’s claim Defendants were not agents. Compl.
 25 ¶¶137-44. Plaintiff recognizes he has overreached, so he now seeks to divide his claim
 26 into multiple “detentions, both short and long.” Opp’n 34-37. But, Plaintiff is not
 27 entitled to replead his claim via motion practice; Plaintiff’s claim as pled is not limited
 28 to the period of Defendants’ interrogation—Plaintiff claims Defendants are the direct

1 cause of his *entire* detention. Pivoting, Plaintiff now introduces new allegations, such
 2 as “[Plaintiff’s] torture has left the government apparently unwilling to release him for
 3 fear that somehow he may have been radicalized and poses a continuing threat ... or—
 4 much more likely that he would further publicize details of his treatment to the
 5 detriment of the CIA’s bureaucratic interests,” Opp’n 36, and, that “the purported
 6 ‘confessions’ they extracted from him, have created political risk of any country to
 7 accept him out of Guantanamo.” *Id.* at 37. These allegations cannot be considered.
 8 *Schneider v. Cal. Dept. of Corrs.*, 151 F.3d 1194, 1198 n.1 (9th Cir. 1998).

9 Moreover, Plaintiff presses his claim against the wrong party. Detention is
 10 arbitrary when it is “not accompanied by notice of charges; if the person detained is not
 11 given early opportunity to communicate with family or to consult counsel; or is not
 12 brought to trial within a reasonable time.” *Martinez v. City of Los Angeles*, 141 F.3d
 13 1373, 1384 (9th Cir. 1998). But, Defendants are not alleged to have control over
 14 charging, prosecuting or making counsel available to Plaintiff.⁸ Thus, Defendants
 15 cannot be liable for his alleged arbitrary detention. *See Liu Bo Shan v. China Const.*
 16 *Bank Corp.*, 421 Fed. App’x. 89, 92-93 (2d Cir. 2011). In *Liu Bo Shan*, the court held
 17 that a Chinese Bank could not be held liable for arbitrary detention claims even if it
 18 facilitated the plaintiff’s arrest, manufactured false evidence against him and knew the
 19 manner in which he would be treated during his detention. *Id.* Notably, the Bank
 20 operated as an arm of the government and was not an entirely private entity. *Id.* at 92.
 21 Nevertheless, the Bank could not be held an instrumentality for all of the government’s
 22 actions, just as Defendants cannot be held liable for 22 years of Plaintiff’s detention at
 23 the hands of the executive branch or the military. Moreover, adopting Plaintiff’s theory
 24 would extend Defendants’ liability for his detention in perpetuity and extend liability
 25 for his detention to every individual and entity involved. Plaintiff’s theory is absurd.

26
 27
 28 ⁸ As such, any UN decision concerning Plaintiff’s detention is inapposite. Opp’n 33.

1 DATED this 5th day of February, 2024.

2
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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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